

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RODRICK DEUN COLE,

Defendant and Appellant.

B211481

(Los Angeles County  
Super. Ct. No. BA313228)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed.

Marilyn Drath, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

---

## INTRODUCTION

Defendant Rodrick Deun Cole was convicted by jury on three counts of assault with a deadly weapon involving different victims (Pen. Code,<sup>1</sup> § 245, subd. (a)(2)). The jury found as to all counts that defendant had personally used a firearm under section 12022.5, subdivision (a).<sup>2</sup> In a bifurcated proceeding, defendant waived his trial rights and admitted he had suffered 12 prior serious or violent felony convictions for robbery making him subject to sentencing under the “Three Strikes” law and section 667, subdivision (a)(1). Prior to sentencing on September 26, 2008, the court struck all but one of defendant’s prior strike convictions for robbery because they arose “from one occasion.” Rejecting defendant’s plea for imposition of a less severe sentence based on the fact his prior crimes were committed when he was a juvenile, and the victims’ behavior led to his criminal conduct, the court imposed an aggregate sentence of 35 years in state prison.

On October 7, 2008, defendant filed a notice of appeal from the judgment. On November 14, 2008, the trial court recalled the sentence and commitment previously ordered as unauthorized, and without argument by counsel, resentenced defendant to an aggregate state prison term of 29 years 8 months (§ 1170, subd. (d)).<sup>3</sup>

On appeal, defendant contends the imposition of the upper term of the firearm-use enhancement on count 2 violated his federal constitutional rights to a jury trial, proof

---

<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> The trial court found the jury hopelessly deadlocked on the additional counts of shooting at an occupied vehicle (§ 246) and discharging a firearm with gross negligence (§ 246.3), and declared a mistrial as to those counts. On the People’s motion, the court subsequently dismissed those counts in furtherance of justice (§ 385).

<sup>3</sup> The trial court improperly doubled the firearm-use enhancement associated with the base term and imposed the full term rather than one-third of the term on the enhancements associated with the subordinate terms. (See § 1170.1, subd. (a).)

beyond a reasonable doubt and due process. We conclude there is no merit to defendant's contention and affirm the judgment.

### **FACTS<sup>4</sup>**

On the night of October 14, 2006, defendant was in a car driven by his girlfriend, Jasha, when he leaned out and fired a gun at his former girlfriend, Nakia Vinson, who was tailgating Jasha in a jealous rage. Seated in Vinson's car was her friend, Myehisha Bridges. Vinson and Bridges stopped following Jasha, and their friend, Diamond Stephens (Stephens), agreed to drive behind Jasha's car to get her license plate. Moments later, defendant fired his gun at Stephens. None of the women were hit by the gunfire.

### **DISCUSSION**

Defendant's aggregate state prison sentence of 29 years 8 months consisted of eight years (the upper term of four years doubled under the Three Strikes law) for assaulting Stephens with a firearm (count 2, the base term), plus the upper term of 10 years for the firearm-use enhancement,<sup>5</sup> plus five years for the prior serious felony enhancement. On each of counts 1 and 3, defendant received a consecutive term of two years (one-third the middle term of three years doubled under the Three Strikes law) for

---

<sup>4</sup> Because counts 4 and 5 were dismissed, only the trial evidence presented in support of counts 1 through 3, the three counts of assault with a firearm, is summarized here.

<sup>5</sup> Section 12022.5, subdivision (a), authorizes imposition of an additional and consecutive term of imprisonment of three, four or ten years if a firearm was personally used in the commission of the charged felony. Section 12022.5, subdivision (d), expressly provides the additional term shall be imposed for any violation of section 245 if a firearm was used notwithstanding the fact that use of a firearm is an element of that offense.

assault with a firearm, plus 16 months (one-third the middle term of four years) for the firearm-use enhancement.

Citing *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*), defendant contends that imposition of the upper term firearm-use enhancement on count 2 was impermissibly based on facts not found true by a jury beyond a reasonable doubt or admitted by defendant.

At the resentencing hearing on November 14, 2008, the trial court stated, “defendant is sentenced to high term four years state prison, doubled pursuant to Three Strikes to -- high term four years, doubled pursuant to Three Strikes to eight years; plus ten years high term on the gun allegation. [¶] The court chooses the high term because the defendant’s criminal record, because his high rate of recidivism, and because he actually, the gun was actually fired at the victim in count 2. The court selects count 2 as the principal term.”<sup>6</sup>

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*), the United States Supreme Court held that a defendant had a constitutional right to have the jury, not the trial judge, decide all facts that increase the penalty for a crime beyond the prescribed statutory maximum, except for prior convictions. (See also *Blakely v. Washington* (2004) 542 U.S. 296, 301 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Cunningham, supra*, 549 U.S. at p. 288.) In *Cunningham*, the Court concluded that because California’s determinate sentencing law (DSL) “authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent.” (*Cunningham, supra*,

---

<sup>6</sup> According to the probation report, defendant was 27 years old at the time of the offenses. His criminal record consisted of a juvenile history of petty theft and resisting arrest in February 1996, for which he was ordered home on probation; receiving stolen property in April 1996, for which he was ordered home on probation; and burglary in June 1996, for which he was ordered into camp community placement. His adult criminal history consisted of 12 robbery convictions in February 1998, for which he was sentenced to 100 months in state prison.

at p. 293, fn. omitted.) The Court held that the middle term in the DSL was the relevant statutory maximum for the purpose of applying *Apprendi* and its progeny.

In response to *Cunningham*, the California Legislature passed Senate Bill No. 40, signed by the Governor as an emergency measure effective March 30, 2007, which amended section 1170 so as to eliminate the presumptive middle term in the triad of sentencing options available. Instead, section 1170 now provides that the trial court has discretion to select the upper, middle or lower term. (§ 1170, subd. (b) [“[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court”]; see *People v. Sandoval* (2007) 41 Cal.4th 825, 845.)

Defendant argues that different rules apply when considering the sentence imposed on the enhancement as opposed to the offense. He is correct that when the Legislature amended section 1170, subdivision (b), governing the imposition of sentence on offenses, it did not similarly amend section 1170.1, subdivision (d), governing the imposition of sentence on enhancements. (*People v. Lincoln* (2007) 157 Cal.App.4th 196, 204-206.) While the middle term was no longer the presumptive term for offenses when defendant was resentenced, it was the presumptive term for enhancements.<sup>7</sup> Thus, *Cunningham* applied to the imposition of the upper term on a section 12022.5, subdivision (a), enhancement.

---

<sup>7</sup> The version of section 1170.1, subdivision (d), in effect at defendant’s resentencing on November 14, 2008, provided that “[w]hen the court imposes a prison sentence for a felony pursuant to Section 1170 . . . , the court shall also impose, in addition and consecutive to the offense of which the person has been convicted, the additional terms provided for any applicable enhancements. If an enhancement is punishable by one of three terms, the court shall impose the middle term unless there are circumstances in aggravation or mitigation, and state the reasons for its sentence choice, other than the middle term, on the record at the time of sentencing. . . .” After defendant filed his opening brief in this case, the Legislature amended section 1170.1, subdivision (d), on October 11, 2009, rendering it compliant with its other post-*Cunningham* amendments to the DSL. (See Stats. 2009, ch. 171, § 5; Stats. 2007, ch. 3, § 3.)

In this case, the trial court relied on defendant's criminal history, which included his numerous prior convictions, which he admitted. This is a factor related to recidivism that need not be found by the jury; a trial court can impose an upper term based on its own determination the defendant had numerous prior convictions. (*People v. Towne* (2008) 44 Cal.4th 63, 70-71, 82.) We interpret the trial court's sentencing decision as imposing the upper term on the firearm-use enhancement based on its finding that defendant had an extensive criminal record, and the upper term on the assault with a firearm conviction within its discretion based on the manner in which the offense was committed.<sup>8</sup>

### **DISPOSITION**

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.

---

<sup>8</sup> Because the statutory presumption for the middle term for the assault with a firearm conviction has been eliminated, imposition of the upper term for that offense rested with the sound discretion of the trial court, obligating only a statement of reasons; no additional findings were necessary. Here, the trial court noted the manner in which the offense was committed; the evidence showed defendant actually fired (rather than merely threatened to fire) the gun at Stephens.